No. 385

FILED
SEP 2 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

BERNARD OXENBERG,
Appellant

vs.

STATE OF ALASKA
Appellee

Upon Appeal from the Supreme Court of Alaska

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

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vs.

STATE OF ALASKA
Appellee

Upon Appeal from the Supreme Court of Alaska

JURISDICTIONAL STATEMENT

MATTER APPEALED FROM

This is an appeal from a decision of the Supreme Court of the State of Alaska reported in 362 P(2d) 893. The opinion is set out in Appendix A herein.

GROUNDS FOR INVOKING JURISDICTION

This appeal brings in question the validity of a statute and constitutional provision of the State of Alaska, on the ground that they are in conflict with the Constitution of the United States.

Appellant was convicted of the crime of arson in the first degree and burning to defraud an insurer, in violation of §65-5-1, Alaska Compiled Statutes Annotated, 1949, as amended, and §65-5-6, Alaska Compiled Laws Annotated, 1949, as amended, and was sentenced to a term of six years on the offense

of arson in the first degree, and to a term of three years in prison on the offense of burning to defraud an insurer, both sentences to run concurrently.

The indictment was brought in by a federal grand jury at a time after Alaska had become a state. The prosecution was in the *name of the United States* and was conducted by the United States Attorney and neither the grand jurors, the United States Attorney nor the Judge who heard the case had placed themselves in any way under the control of the State of Alaska, nor had they acknowledged any allegiance to the State of Alaska or agreed to support its constitution. The authority for the United States to prosecute the case was derived, according to the decision of the Alaska Supreme Court, from the Alaska constitution and a statute approving the Alaska Statehood Act. This portion of the Alaska constitution and the Alaska statute are now drawn into question as violative of the constitution of the United States.

The verdict and judgment in this case were entered in the United States District Court for the State of Alaska, Division No. 1, on November 3, 1959. Notice of Appeal to the Supreme Court of Alaska was filed November 27, 1959.

The opinion of the Supreme Court of Alaska affirming the conviction was filed May 16, 1961. On June 29, 1961, the Alaska Supreme Court, entered its order denying rehearing. Notice of Appeal to the Supreme Court of the United States was filed in the Alaska Supreme Court July 6, 1961.

The statutory provision believed to confer on this court jurisdiction of the appeal is Title 28, U. S. Code, §1257 (2).

Cases sustaining the jurisdiction of this court

are: *Hamilton v. Regents of the University of California,* 293 U.S. 245, 79 L. Ed. 343, holding that a state statute within the meaning of §1257 of Title 28 U. S. C. is every act of a legislative character to which a state gives sanction; *Farcombe v. Denver,* 252 U. S. 7, 64 L. Ed. 424; *Baccus vs. Louisiana,* 232 U. S. 334, 58 L. Ed. 627; *McElvaine v. Brush,* 142 U. S. 155, 35 L. Ed. 971, in which it has been held that this court, when dealing with a state statute accepts the meaning of the statute construed by the highest court of the state.

The Supreme Court of Alaska, in the decision appealed from has held that a provision of the Alaska constitution, §17 of Article XV, together with the Alaska statute approving the Alaska Statehood Act, namely Chapter 50, Session Laws of Alaska, 1959, §32(2) as amended by Chapter 151, Session Laws of Alaska, 1959, §2, Alaska Compiled Laws Annotated, 52-A-1-31, and the Act of Congress setting up statehood, particularly Sec. 18, 72 Stat. 350 (1958), together constitute authority for the prosecution by and under the authority of the United States of an offense against the laws of the State of Alaska. In the lower court appellant raised the question of the constitutional validity of the Alaska constitutional provision and of the Alaska statute referred to, as construed by the Alaska Supreme Court.

Section 17 of Article XV, of the Alaska constitution reads as follows:

> "Section 17. Transfer of Court Jurisdiction. Until the courts provided for in §4 are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission, unless otherwise pro-

vided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes other than those under the jurisdiction of the United States pending in the courts existing on the date of admission shall be transferred to the proper state court as though commenced, filed or lodged in those courts in the first instance, except as otherwise provided by law."

Section 32 (2) Chapter 50, Session Laws of Alaska, 1959, as last amended by said Chapter 151, Section 2, Session Laws of Alaska, 1959, Alaska Compiled Laws Annotated 52-A-1-31, reads as follows:

"Commencement and transfer of cause. (1) The state courts shall be deemed organized for the purpose of transferring causes as provided in §17, Article XV of the constitution of the State of Alaska on the 3rd day of January, 1962. Provided, however, that causes may be commenced, filed and determined by the state courts in each judicial district at the time of the appointment of one or more judges for such district.

"(2) The jurisdiction of the courts of the state in this Act provided shall be exclusive from and after the 3rd day of January, 1962, but prior to that date shall be non-exclusive and nothing in this Act shall diminish or deprive the District Courts of the State of Alaska or the Court of Appeals or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress and other laws applicable thereto."

The Supreme Court of Alaska construed those two provisions, together with Section 18 of the Alaska Statehood Act, 72 Stat. 350 (1958) (48 U. S. C. A. 1960 Supp. page 13) as permitting prose-

cutions for violations of state law to be commenced after statehood in the name of the United States and to be carried on by the United States Attorney, saying: (Opinion, page 13):

> "Under the judicial system which preceded statehood and as a part of the function of the Territorial District Court, prosecution of a criminal action was in the name of the United States and was carried on by the United States Attorney. This method of handling criminal actions was to continue without change during the period of transition. Therefore, the case against Oxenberg was dealt with just as it ought to have been and his claim or error on this point has no merit."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. In a prosecution commenced after Alaska became a state, involving allegel violation of the laws of the state, may the United States act as the prosecuting party, and may United States officials, exclusively, control the litigation?

2. In such prosecution, where the Alaska Enabling Act passed by Congress and an act of the legislature of the state of Alaska, together with a provision of the Alaska Constitution, have been construed by the Alaska Supreme Court as permitting the United States and its officials to prosecute and control a criminal action commenced after statehood, for violation of state law, does such Alaska statute and constitutional provision and the Alaska Enabling Act, as so construed, violate the United States Constitution by conferring upon the United States powers not delegated by the federal Consti-

tution and which infringe the sovereignty of the State of Alaska?

3. In such a prosecution, started under the authority of the United States, and carried on solely by the United States District Attorney, responsible only to the United States, and initiated by indictment of a federal grand jury, have authorities of the State of Alaska standing to replace the United States and its officers as prosecuting party and officers controlling the litigation?

4. In such a prosecution, where neither the grand jury, the prosecuting official, nor the judge trying the case has assumed any allegiance to the Alaska Constitution, is the federal Bill of Rights or the Alaska Bill of Rights available for the protection of the defendant, and if not, is due process of law observed?

STATEMENT OF THE CASE

Alaska was admitted to the federal Union on the 3rd day of January, 1959, by proclamation of the President No. 3269, 24 Fed. Reg. 81, Title 48 U. S. C. A. 1960 Supp. page 22. By the act of admission, 72 Stat. 339, as amended, §1:

> ". . . the State of Alaska is hereby declared to be a state of the United States of America, is declared admitted to the Union on an equal footing with the other states in all respects whatever . . . "

A federal grand jury, convened by the United States District Judge for the District of Alaska, Division No. 1, at Ketchikan, and assisted by Roger G. Connor, United States Attorney, and C. Donald O'Connor, Assistant United States Attorney, on the 10th day of April, 1959, brought in an indictment

against defendant Bernard Oxenberg, charging him with violation of Section 65-5-1 of the Alaska Compiled Laws as amended, and Section 65-5-6 of the Alaska Compiled Laws as amended (Tr. 3). The indictment charged the defendant in the name of the *United States of America* (R. 1). Neither the United States Attorney nor the Assistant United States Attorney who were present in the grand jury proceedings, was admitted to the Bar of Alaska nor had taken an oath to support the Constitution of Alaska (Tr. 16); nor were the grand jurors sworn under the laws of Alaska.

Prior to the beginning of the trial of this case, defendant moved to dismiss on the ground that the United States was not a proper party (Tr. 12) and on the ground that the grand jury was not properly formed, constituted or administered (Tr. 15). At the opening of the trial, exception was taken by the defendant to the proceedings, based upon the lack of the proper prosecuting party (Tr. 14), and to the fact that the United States Attorney, not a state official, was present during the grand jury proceedings. These motions were denied (Tr. 16). At the opening of the trial, the Judge instructed the jury that the parties to the case were the United States on the one hand, and the defendant on the other (Tr. 36). The State of Alaska did not appear.

After the conviction of this defendant, an appeal was taken to the Supreme Court of Alaska. The first assignment of error upon the appeal was:

> "The court erred in entertaining the action in the absence of a competent prosecuting party and under an improper indictment."

In appellant's brief, in the statement of questions

presented to the Alaska Supreme Court were the following:

> "1. Could the United States constitutionally act as prosecuting party after Alaska became a state in a case not involving a crime against the United States?
>
> "2. Was an indictment brought in after statehood valid when neither the Judge convening the grand jury nor the prosecuting attorney present at its sessions had qualified as Alaska public officials or had assumed any responsibility toward the State of Alaska?"

In the Statement of Points to be Relied Upon (R. 64) appellant included the following:

> "2. The indictment was not legally sufficient,
>
> "3. The grand jury was not properly formed, organized, constituted or administered;
>
> "4. The prosecuting party and prosecuting officials were not legally authorized to prosecute the case."

In the opinion of the Supreme Court of Alaska, under the heading "Validity of the Indictment" (see opinion, page 11) the court stated:

> "In the indictment the United States of America was named as plaintiff, and the prosecution of the case was by the United States Attorney. The offense charged was a violation of state law, and prosecution was instituted and concluded after Alaska became a state but prior to the organization of the constitutional state court system. The case was tried by the District Court for the District (Territory) of Alaska. Oxenberg contends that in these circumstances the indictment was invalid because prosecution was not under state authority and

was not under the control of qualified state officials."

While the matter was in the Supreme Court of Alaska and without any formal notification to appelant, the title of the case was changed from "Oxenberg vs. United States" to "Oxenberg vs. State of Alaska," and the Alaska Attorney General took over the handling of the appeal, all without any formal substitution.

The Alaska Supreme Court in its opinion disposed of the contention that the government had no authority to prosecute, as follows:

> "The existence of the interim court was originally contemplated by the delegates to Alaska's constitutional convention. The state constitution, which was ratified by Alaska's voters on April 24, 1956, provided in Article XV, Section 17 that until the state courts were organized 'the judicial system shall remain as constituted' on the date of admission of Alaska as a state. In section 18 of the Statehood Act, Congress specifically provided that the judicial system so remained, by stating that the Territorial District Court 'shall continue to function as heretofore'. In addition, the same section provided that the tenure of the United States Attorneys would terminate at such time as the interim court would cease to function. Alaska then approved the provisions of the Statehood Act, in S. L. A. 1959, Chapter 50, Section 32, (2), as amended by S. L. A. 1959, Chapter 151, Section 2.
>
> "Under the judicial system which preceded statehood and as a part of the functioning of the Territorial District Court prosecution of a criminal action was in the name of the United States and was carried on by the United States Attorney. This method of handling criminal

> actions was to continue without change during the period of transition. Therefore, the case against Oxenberg was dealt with just as it would have been and his claim of error on this point has no merit."

After decision of the case by the Alaska Supreme Court, appellant petitioned for rehearing, again raising the point that the United States had no authority to prosecute the case (R. 79).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case involves a fundamental question with respect to the relationships between the federal government and its sovereign states. The right of the United States to prosecute and punish violations against state law is negatived by the very form of our federal system and our federal constitution. A state has no right to "make a federal case" out of charges that its state laws have been violated, nor has the United States any right to accept the responsibilty for prosecutions for violations of state law. A citizen being prosecuted for the violation of a state law has a right to the protection of the constitution of that state, and such bill of rights as it has, but if the prosecution is carried on by federal officials not responsible to the state and acknowledging no allegiance to its constitution, a citizen is deprived of the state constitutional protection.

Likewise, where the prosecution is by the federal government for the violation of state laws, the protections of the federal constitution are not available with respect to the applicability of those state laws, since state laws are made independently (with cer-

tain immaterial exceptions) of the delegated powers of the federal constitution.

This is more than a matter of semantics. This is a matter of fundamental rights of a citizen.

If it be considered that any statute of Alaska, particularly those cited by the Alaska Supreme Court, S. L. A. 1959, Chapter 50, Section 32 (2), as amended by S. L. A. 1959, Chapter 150, Section 2 and Section 17 of Article XV of the Alaska Constitution, constitute authority for the United States to function as a prosecuting party under the state law, then those statutes are contrary to the requirements of the federal Constitution. Those are functions of sovereignty which are not delegable by the United States.

If the United States is here acting as agent for the state, it is an agency wholly lacking in control by, or responsibility to, the principal.

The federal government has no authority to act as agent for a state, nor has a state any authority to confer agency upon the federal government for the purposes of prosecuting its criminal laws, and these things are beyond the powers of the respective legislatures. These are constitutional matters. The state could not abdicate its responsibility for prosecutions commenced for the enforcement of its laws. That is what occurred in this case. There was no element of state control over the prosecution, the indictment, nor the trial, and none of the federal officials connected therewith ever assumed any allegiance to the constitution of Alaska by the taking of an oath to support that constitution. It was strictly a federal affair, in a situation where the federal government had no constitutional right to function.

While it is true that under the judicial system that existed in Alaska before statehood, the United States was the prosecuting party, that fact did not permit it to be a prosecuting party after statehood. That is true for the simple reason that before statehood, the United States was the sovereign, with authority to prosecute for crimes, whereas after Alaska became a state, that sovereignty ceased and was replaced by Alaska as the sovereign. Only the sovereign can prosecute for violation of a crime.

The United States is a government of delegated powers only. Whatever power is not expressly given to the general government is expressly reserved by the states. *U. S. vs. Hudson,* 11 U. S. 32, 3 L. Ed. 316, *McCulloch vs. Maryland,* 17 U. S., 316, 4 L. Ed. 579.

Every federal prosecution must be sustained by statutory authority. *Krulewick vs. United States,* 336 U. S. 440, 93 L. Ed. 790. There is no constitutional authority for the United States to prosecute this case. While the Supreme Court of Alaska has interpreted Section 17 of Article XV of its constitution, together with one of its statutes as constituting such authority, the state is simply without power to turn over that sovereign function to the United States and if the Alaska Enabling Act passed by Congress be interpreted as constituting an acceptance of such responsibility, that act of Congress is unconstitutional because of the lack of that kind of delegated authority in the federal constitution. We submit that what this court said in *Benner vs. Porter,* 9 How (U. S.) 235, 13 L. Ed. 119, with respect to the effect of the admission of Florida, is fully applicable here:

"We think it therefore clear that on the uncon-

> ditional admission of Florida into the Union as a state . . . the territorial government was displaced and abrogated, every part of it; and that no power of jurisdiction existed within her limits except that derived from state authority and that by force and operation of the federal constitution and laws of Congress . . ."

Neither the federal constitution nor any law of Congress authorizes the prosecution by the United States within a state of offenses against the state. In *United States vs. Reese,* 92 U. S. 214. 23 L. Ed. 563, the federal Supreme Court said:

> "If Congress has not declared an act done within a state to be a crime against the United States, the courts have no power to treat it as such."

Long ago, this court dealt with the proposition that the federal government has no authority to assume jurisdiction over acts not properly offenses against the sphere of authority constitutionally exercised by the federal government. In *U. S. vs. Fox,* 95 U. S. 670, 24 L. Ed. 538, the Supreme Court said:

> "But an act committed within a state, whether for good or bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or is some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate."

While the existing court system was adopted by the State of Alaska, through its constitution, this court has recognized that the interim court in so functioning, when dealing with state matters, " . . . sat as a court of the state." *Metlakatla Indian Community v. Eagan,* 263 U. S. 555, 4 L. Ed. (2d)

1397. Thus, in this case, we are dealing with a prosecution *under the authority of the State* of Alaska in a *state* court.

While the constitution of Alaska adopted the existing courts, the continued existence of these courts under this adoptive procedure did not permit a party having no capacity to sue to maintain an action before the court. That is exactly what occurred here.

The United States, after statehood, lacked capacity to sue or to maintain an action for the violation of a state law in the state court of Alaska. The federal constitution gave Congress no right to authorize the United States to act as a party to criminal litigation involving the laws of the state. The text of 81 C.J.S. 870, says:

> "As to individual states and the United States, the constitution marks the boundary of powers, and neither the states nor the United States, can by their own legislation, enlarge their own powers to or restrict those of the other. In other words, neither the national nor the state government may, by its powers, impair the other's sovereignty."

The objection that the United States could not prosecute this action is a matter of substance. As a matter of constitutional law the distinction between he two sovereignties is so great that where the same act may be prosecuted under both federal and state laws, it is no defense to a prosecution by one sovereignty to plead jeopardy by the other sovereignty. Thus in *U. S. vs. Lanzt,* 260 U.S. 377, 67 L. Ed. 314, this court said:

> "It follows that an act denounced as a crime by both national and state sovereignties is an

> offense against the peace and dignity of both, and may be punished by each."

To the same effect, see *Hebert vs. Louisiana*, 272 U. S. 312, 71 L. Ed. 270, 48 A.L.R. 1102. Also see text of 14 Am. Jur. 769. If indeed this is a prosecution by the United States as it purports to be, then an acquittal on the charge, or *nolle prosque* or dismissal by the United States Attorney, who would not have to ask the permission of the state, would not have precluded the State of Alaska from again subjecting the defendant to prosecution on the charge. Either the United States had standing to maintain its prosecution or it did not. If it had standing to maintain the prosecution it did so without being answerable in any way to the State of Alaska and without any right of control of the prosecution by the state.

Where a cause is prosecuted by a United States District Attorney, he has exclusive direction of the prosecution. This Court in the *Confiscation Cases*, 74 U. S. 454, 19 L. Ed. 196, said:

> "Public prosecutions . . . are within the exclusive direction of the District Attorney."

There is nothing in either the federal constitution nor in an act of Congress by which the federal government acknowledged any right by the sovereignty of Alaska to control this prosecution brought in the name of the United States. The United States Attorney alone could have entered a *nolle prosque*. If the United States could maintain this action, then, even though the whole sovereign power of Alaska, including the people in their constitution amending capacity, and from its governor on down, had attempted the dismissal of the charge the at-

tempt would have been unavailing because the prosecuting officials and the prosecuting sovereignty were beyond the control of the state.

The federal constitution simply has not given to the federal government any such power in connection with the enforcement of purely state laws. A citizen charged with a crime against state law has, as a matter of principle, a right to be held answerable only once and has a right to know that the prosecution is under the control and authority of the sovereignty whose policy is being served.

A citizen whose rights are involved has the right to look to the sovereignty from which the authority to prosecute is derived for the exercise of that discretion which exists in any prosecuting party, to determine whether a prosecution shall be instituted or continued.

If the constitution of Alaska means anything, a citizen being prosecuted for a crime under its laws is entitled to the protection of all the provisions of the Alaska constitution and no prosecution may be carried on by persons not subject to that constitution. The United States in this case is not merely the state of Alaska acting under another name, but is a separate, distinct and independent sovereignty, not bound by the Alaska Constitution or laws or amenable to the control of the state. Its presence in this case is constitutionally unauthorized and is prejudicial to the rights of this defendant.

WHY APPEAL WAS CHOSEN RATHER THAN CERTIORARI

In this case counsel for appellant has followed the procedure for appeal for the reason that it is believed that the decision of the Supreme Court of

Alaska constituted a construction of Section 17 of Article XV of the Alaska Constitution and Section 32 (2) of Chapter 15, Session Laws of Alaska, 1959, as amended by Section 2, Chapter 151, Session Laws of Alaska, 1959, in such a way that it was its determination that those statutes authorized the United States to act as prosecuting party. This drew into question the validity of state statutes and counsel has concluded that the appropriate procedure is under Paragraph (2) of Section 1257 of the United States Code relating to appeal. This matter does also draw into question the validity of a statute of the United States as construed by the Supreme Court of Alaska, namely Section 18 of the Alaska Statehood Act, 72 Stat. 339, 1958.

If the court should consider that the remedy should have been by petition for writ of certiorari instead of by appeal, it is requested that the proceeding be treated as a petition for a writ of certiorari, in keeping with the provisions of Section 2103 of Title 28, United States Code.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX A

In the Supreme Court of the State of Alaska

BERNARD OXENBERG, *Appellant,* v. STATE OF ALASKA, *Appellee.*	**File No. 19** **OPINION** **[No. 36 — May 16, 1961]**

Appeal from the District Court for the District (Territory) of Alaska, First Judicial Division, at Ketchikan.
Raymond J. Kelly, *Judge*

Appearances: C. L. Cloudy, Ziegler, Ziegler & Cloudy, Ketchikan, and Josef Diamond, Lycette, Diamond & Sylvester, Seattle, Washington, for Appellant; Ralph E. Moody, Attorney General of Alaska, Juneau, and Howard P. Staley, District Attorney, Ketchikan, for Appellee.

Before: Nesbett, Chief Justice, and Dimond and Arend, Justices.

DIMOND, Justice:

A Ketchikan jury found Oxenberg guilty of the crimes of first degree arson and burning a building with intent to defraud insurers. On this appeal there are various assignments of error, the principal one being the trial court's denial of Oxenberg's motion for a judgment of acquittal. The basis of the motion was that the evidence was insufficient

to sustain a conviction because of the lack of competent corroboration of the testimony of an alleged accomplice.

The Independent Salmon Cannery building at Ketchikan was destroyed by fire during the early morning hours of October 3, 1958. Elvin Sahlinger, who had fished for Independent, confessed that he had set the fire with gasoline which he had poured on fishing nets stored in the building. He was convicted of arson on a plea of guilty and received a suspended sentence.

As a witness for the prosecution Sahlinger testified at length regarding the events surrounding the incident. The sum and substance of his narrative was that he had set the fire at Oxenberg's request in consideration for the latter's promise to pay him $2,000. The government produced a quantity of evidence in an effort to corroborate Sahlinger's testimony. It consisted chiefly of the following:

(1) The cannery building was insured.

(2) The fire was of incendiary origin.

(3) The Independent Salmon Cannery was owned by Samuel Oxenberg, appellant's father. The appellant was the only member of the family who took an active part in the management of the corporation. He acted as president after his father's death, signed many papers in that capacity, and executed and submitted to the insurance companies proof of loss with respect to the destruction of the cannery. He had an expectation of sharing in the distribution of his father's estate, the assets of which presumably would have been enhanced by the

proceeds from the insurance on the cannery building.

(4) For two years preceding the fire, Independent had operated at a loss. Its annual salmon pack had dropped from 35,000 cases in 1956 to 13,000 in 1-958, despite the fact that the total Southeastern pack in 1958 was greater than in 1956. Expectations for fish in 1959 were not good. The fish traps could not operate after 1958, and for various reasons by the fall of 1958 the fishermen upon whom Independent had relied for its supply of fish had dwindled in number to the point where the likelihood of a successful cannery operation was remote. During the 1958 season Independent was short of cash, and a number of substantial bills had not been paid.

The government points to these things as giving rise to a motive for destroying the cannery building—i.e., to close off a business operation where the assets of business had become seriously depleted and where the outlook for the future was bleak.

(5) The cannery accountant discovered the fire at approximately 2:30 a.m. He ran to Oxenberg's room in the cannery building to awaken him, and found him in bed wearing shorts and an undershirt, with the light on in the room. The accountant told Oxenberg to get out as fast as he could (without stating that there was a fire), and Oxenberg sat up in bed and asked if "we were on fire." The fire could not be seen from Oxenberg's room.

The government argues from this that a jury might reasonably have concluded that this indicated Oxenberg's guilty knowledge, and served to cor-

roborate Sahlinger's testimony that Oxenberg had planned the conflagration.

(6) On the date preceding the fire Oxenberg exhibited impatience and irritation with several fishermen who were working on their gear following the close of the fishing season. One fisherman was reprimanded for attempting to hoist a dripping wet seine net in a second story window of the building for storage. The state argues that a jury could infer from this that Oxenberg was concerned about the floor getting any wetter than it already was, for fear it would not burn that night.

The same man, who had been a satisfactory fisherman for Independent for a number of years, was told by Oxenberg to move his nets and gear to another cannery, and if he did not that Oxenberg was going to hurt him. The inference here, according to the state, is that the "hurt" would be the destruction of the fishing gear.

Two fishermen were not permitted to enter the cannery to take showers at about 5 to 5:30 p.m. on the day preceding the fire—Oxenberg stating that the cannery was being locked up. Apparently, this was an unusually early hour to close the building during the period of the year when fishermen were working on their gear. The state asserts that this could create the inference that Oxenberg wanted to get everyine out of the building early so that preparations could be made for the fire.

(7) Independent had been delinquent in payment of its utility bills throughout the summer and fall of 1958, and at the time of the fire owed over $1,900. Demands made for payment from time to

time had been unsuccessful. On the day of the fire the utility company informed Oxenberg that if payments were not made immediately a claim would be submitted to the insurance company. Oxenberg promptly paid $1,000 and agreed to pay the remainder within a week. The state contends that a jury could properly interpret Oxenberg's anxiety and actions as showing a consciousness of guilt—that is, his unwillingness to have the insurance companies know of the true financial condition of the cannery.

(8) Miscellaneous groceries, junk and other items that had accumulated in the cannery over a period of years were sold at Oxenberg's direction on the day preceding the fire for over $400. Oxenberg showed concern that the money from the sale be immediately deposited in the bank. The jury could infer from this, the state argues, that Oxenberg was trying to obtain every bit of possible cash out of the cannery before the fire, and did not want the proceeds from the sale of those items to be destroyed.

(9) According to Sahlinger's testimony, a man named Muller was an accomplice of Oxenberg in planning the fire. Evidence was introduced establishing that after the fire Muller gave money to Sahlinger in varying amounts on seven different occasions. The state maintains that this serves to corroborate Sahlinger's statement that Oxenberg had told him, in regard to his compensation for starting the fire, that Muller would take care of him "on the money part."

1. ***Corroboration.***

The principal question here is whether there is evidence sufficient to satisfy the statutory requirement of corroboration of an accomplice's testimony.[1] In submitting the case to the jury, the trial court instructed them on that point as follows:

> "... In order for you to determine whether the other evidence in the case corroborates Sahlinger's implication of Oxenberg, you must first put all of Sahlinger's testimony from your mind and then review the evidence that is left in the case to see if it tends to connect the defendant Oxenberg with the crimes charged without reference to the testimony of Sahlinger. If this remaining evidence is a consistent with the innocence of defendant Oxenberg as with guilt, you must acquit him. If it does no more than raise a suspicion, no matter how shrewd or well founded, that defendant Oxenberg might be involved in these crimes, you must acquit him. There must be more than mere conjecture on your part that the defendant Oxenberg is connected to these crimes before you can find that this remaining evidence tends to connect him to them."

Oxenberg has no quarrel with this instruction. He asserts that it evidences a proper construction of the statute—that there is no corroboration unless the evidence offered, considered by itself and not in relation to the accomplice's testimony, is

[1] Section 66-13-59 ACLA 1949 provides: "That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

consistent with guilt and inconsistent with innocence.[2] The point he makes, however, is that all of the government's evidence, exclusive of Sahlinger's testimony, was consistent with innocence, and not with guilt; and therefore, there was no evidence sufficient to constitute legal corroboration. Thus, Oxenberg contends that it was error for the court to deny his motion for a judgment of acquittal and to submit the case to the jury.

The requirement of corroboration was based historically on the assumption, or suspicion, that the accomplice might expect to purchase immunity from punishment by falsely accusing and procuring the conviction of others.[3] Implicit here was the assumption that the accomplice was not to be trusted in the story that he told. The word "corroborate" means to strengthen; to make more certain; to confirm.[4] It would seem logical, then, to hold that evidence corroborates when it induces a rational belief that the narrative of the accomplice is a correct one; when it dispels the assumed notion that he was an inventor of facts and incidents. If it does this, then the element of distrust is removed and the object of the statute is accomplished.

In determining whether there is evidence suffi-

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[2] This statement of the rule is supported by decisions from California. See People v. Robbins, 171 Cal. 466, 154 Pac. 317, 319 (1915); People v. Reingold, 87 Cal. App. 2d 382, 197 P. 2d 175, 192 (1948).

[3] 7 Wigmore, Evidence § 2057 at 322 (3d ed. 1940).

[4] Webster, New International Dictionary (unabridged) at 598 (2d ed. 1960).

cient to inspire the fact-finders with confidence in the story of the accomplice, it is impracticable to require that what the accomplice has said be put aside and that the other evidence be examined alone to see if it "tends to connect the defendant with the commission of the crime."[5] We are obliged to observe the terms of the Alaska statute. But its language does not provide, as in a Montana statute, that the other evidence be considered by itself and without the aid of the testimony of the accompilce[6]; and we are not compelled to go further, as California has done, and interpret the statute as requiring that the accomplice's testimony be disregarded in applying the test.[7] The other evidence must corroborate, or strengthen or confirm something, and that "something" can only be the testimony of the accomplice. There may be facts, considered without reference to other things, which will have no particular significance, but which, when considered in the light of the accomplice's testimony, assume considerable meaning. It is only logical, then, to hold that corroborative evidence ought to be viewed in relation to, rather than apart from, the accomplice's narrative in order that it might be fairly and rationally appraised for whatever worth it may have. If such evidence can be brought into contact with the circumstances related by the accomplice, and if at all points of con-

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[5] Section 66-13-59 ACLA 1949.

[6] See State v. Keckonen, 107 Mont. 253, 34 p. 2d 341, 343 (1933).

[7] Note 2, supra.

tact there is consistency and harmony, rather than incongruity and discord, then there is good ground for presuming that what the accomplice said was true. His credit will have been restored—at least to a point where the jury should be permitted to ascertain for itself whether there has been a confirmation of such a number of important facts related by the accomplice as to give reason for believing that the main body of his story it correct. The corroborative evidence fulfills the requirement that it tend to connect the defendant with the commission of the crime because it will "serve as a means"[8] of inducing in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event.

It is the court's function to determine whether the evidence was sufficient to meet the statutory requirement of corroboration; it is then the jury's function to decide whether the evidence is effective in making the accomplice's testimony worthy of belief.[9] The trial judge must be allowed considerable latitude in exercising the discretion required of him. He has the opportunity to observe the manner in which the accomplice details the circumstances of the transaction; and the opportunity to form a considered judgment as to whether the accomplice was collected, whether he possessed observation, whether his recollection was fresh, and

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[8] One of the definitions of "tend" is "to serve as a means". Webster, New International Dictionary (unabridged) at 2600 (2d ed. 1960).

[9] 7 Wigmore, Evidence § 2059(d), at 334 (3d ed. 1940), and authorities there cited.

whether he seemed to be relating actual events or fictitious and invented ones. The trial judge has the opportunity of comparing the details of the transaction as related by the accomplice with other circumstances in the case. He then has the duty of deciding from this whether such other circumstances fit into or correspond with what the accomplice has said in a sufficient number of particulars to justify the reasonable belief that the accomplice was speaking the truth. If the trial judge is satisfied in this, then he must submit the matter to the jury so that it may decide whether to believe or disbelieve what the accomplice has said.

As noted earlier in this opinion, the government offered a considerable amount of evidence for the purpose of corroborating Sahlinger's testimony. Oxenberg can make a plausible argument that each item considered individually was consistent with innocence—that Oxenberg's actions as related by other witnesses could be view as normal behavior in the circumstances in which they occurred. He can also argue with a degree of credibleness that all of the corroborating evidence taken collectively, and considered by itself without relation to Sahlinger's testimony, has no reasonable tendency to connect him with the commission of the crime. But those arguments are not effective when the facts established by other evidence are considered, not alone, but in the light of Sahlinger's testimony. Then those facts have a significance and meaning which they did not have before. They fit in with facts related by Sahlinger to the extent that they

improve the quality of his proof and have the logical effect of persuading trust in his testimony. The inferences which the government suggests the jury might have gathered from such corroborative evidence become reasonable ones. At this point there is a rational tendency to associate Oxenberg with the commission of the offense. The statutory requirement of corroboration was then satisfied, and it was proper for the trial court to allow the jury to weigh all of the evidence, including Sahlinger's testimony, and determine whether what he said was true.

The trial judge instructed the jury to first put Sahlinger's testimony aside, and then determine whether the remaining evidence, standing alone, was consistent with innocence or consistent with guilt. If consistent with innocence, then Oxenerg was to be acquitted. We hold that this was not a correct interpretation of the statute. Under our interpretation, the trial court's instruction was more favorable to Oxenberg than was necessary. Hence, he has nothing to complain about.

2. *Validity of the Indictment.*

In the indictment the United States of America was named as plaintiff, and prosecution of the case was by the United States attorney. The offense charged was a violation of state law, and prosecution was instituted and concluded after Alaska became a state but prior to the organization of the constitutional state court system. The case was tried by the District Court for the District (Terri-

tory) of Alaska. Oxenberg contends that in these circumstances the indictment was invalid because prosecution was not under state authority and was not under the control of qualified state officials.

In the case of *Hobbs v. State of Alaska,* No. 4 359 P.2d 956 (Alaska 1961), we held that the United States District Court for the District (Territory) of Alaska was clothed with jurisdiction of state matters after Alaska became a state and prior to the organization of the state court system. We upheld the jurisdiction of that interim transition court as it related to the prosecution of the crime of larceny in a building, a state offense.

The existence of the interim court was originally contemplated by the delegates to Alaska's constitutional convention. The state constitution, which was ratified by Alaska's voters on April 24, 1956, provided in article XV, section 17 that until the state courts were organized, "the judicial system shall remain as constituted" on the date of admissio of Alaska as a state. In section 18 of the Statehood Act, Congress specifically provided that the judicial system so remain by stating that the Territorial district court "shall continue to function as heretofore."[10] In addition, the same section provided that the tenure of the United States attorneys would terminate at such time as the interim court would cease to function. Alaska then approved the provisions of the Statehood Act in SLA 1959, chapter 50, section 32(2), as amended by SLA 1959, chapter 151, section 2.

[10] Alaska Statehood Act, § 18, 72 Stat. (1958).

Under the judicial system which preceded statehood, and as a part of the functioning of the Territorial district court, prosecution of a criminal action was in the name of the United States[11] and was carried on by the United States attorney.[12] This method of handling criminal actions was to continue without change during the period of transition. Therefore, the case against Oxenberg was dealt with just as it ought to have been, and his claim of error on this point has no merit.

Oxenberg's next contention is that the indictment was invalid because it did not bear the endorsement of the names of witnesses examined before the Grand Jury. This argument is also without merit. We are in accord with what was said by the United States Court of Appeals for the Ninth Circuit:

> " . . . the names of witnesses are not required to be endorsed on any indictment in the District Court for the Territory of Alaska. Such indictments need only conform to the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. The indictment in this case did so conform. It should be noted and remembered that the Federal Rules of Criminal Procedure are now, and have been since October 20, 1949, applicable to all criminal proceedings in the District Court for the Territory of Alaska. See Rule 54(a) (1) of said rules, as amended by the Supreme Court's order of December 28, 1948, 335 U. S. 953, 954, effective October 20, 1949. Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated,

[11] Section 66-1-4 ACLA 1949.

[12] 31 Stat. 324 (1900), 48 U.S.C.A. § 109 (1952).

1949, cited by appellants, became inoperative on October 20, 1949, and remain inoperative."[13]

3. *Newspaper Publicity.*

Through a witness named Tebrich the government offered to prove the substance of a conversation that took place in an automobile containing Oxenberg, Tebrich and two other men during the evening preceding the fire. Out of the presence of the jury, Tebrich said that there was a conversation "about as to who is a heavy sleeper and a light sleeper." He did not recall who started the conversation, and he did not testify as to what any particular person said. This testimony was excluded by the court.

That afternoon the Ketchikan Daily News carried a front page story on the day's events of the trial. In approximately the middle of the newspaper account reference was made to Tebrich's statement about light sleepers. Thes rest of the story, including the heading, was concerned with other developments at the trial. The following morning Oxenberg's counsel moved for a mistrial on the ground that the newspaper had reported testimony which had been excluded by the court, that the jury was presumed to have read it, and that it was seriously prejudicial to Oxenberg. The court denied the motion. Oxenebrg assigns this ruling as error.

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[13] Soper v. United States, 220 F. 2d 158, 159 n. 2 (9th Cir.), cert. denied, 350 U.S. 828, 100 L. ed. 739 (1955). See also United States v. Egelak, 173 F. Supp. 206 (D. Alaska 1959).

There was no showing that any juror had read the news account. Oxenberg argues, however, that it would be beyond credibility to believe that one or more of the jurors, who were allowed to separate at the conclusion of each day in court and return to their homes, had not read the article. That may be a fair assumption.[14] But it would not follow necessarily that the trial court committed reversible error in denying the motion for a mistrial. The fundamental question first to be determined is whether the article was prejudicial—i.e., whether it is likely that the jury's verdict was affected by reason of the statements contained in the newspaper.[15]

That likelihood does not appear in this case. This was not an instance where the jurors were exposed to information of a character which the trial judge had considered so prejudicial it could not be directly offered as evidence.[16] Tebrich didn't know who had started the conversation or who had made the statement regarding light and heavy sleepers. Tebrich's narrative of this event was excluded because, in the words of the trial judge, it wasn't "connected up", that is, the government could not produce other evidence of a similar or connecting nature. The

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[14] Holt v. United States, 218 U.S. 245, 251, 54 L. ed. 1021, 1021, 1029 (1910).

[15] O'Brien v. State, 326 S.W. 2d 759, 766 (Tenn. 1959); Gicin-v. United States, 212 F. 2d 8, 10-11, cert. denied, 348 U.S. 884, 99 L. ed. 695 (1954). Annot., 31 A.L.R. 2d 417, 422, 425 (1953).

[16] Cf. Marshall v. United States, 360 U.S. 310, 312, 3 L. ed. 2d 1250, 1252 (1959).

trial judge did not indicate in any way that he believed the evidence would be prejudicial.

It is extremely doubtful that there could have been any prejudic to Oxenberg—that the jury's verdict was in any way influenced by what one or more jurors may have seen in the newspaper. If the conversation had not been excluded, it would have amounted to nothing more than additional corroborative evidence of the same general type that was admissible and had been introduced. It could have added little to the final result, for without it there was more than ample corroboration to justify the court's decision to submit the case to the jury.

The trial judge has a large discretion in ruling on issues of this kind.[17] We find no abuse of that discretion.

4. *Expert Testimony.*

The Territorial Fire Marshal qualified as an expert witness on the subject of fires, and testified that he had conducted an investigation of the Independent Salmon Cannery fire. Over Oxenberg's objections, this witness stated that in his opinion the fire was of incendiary origin, and he followed this by testifying in detail as to facts upon which his opinion had been formulated.

Oxenberg contends that the admission in evidence of the expert's opinion was erroneous. He asserts that the origin of a fire is a matter of common ex-

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[17] Marshall v. United States, supra note 16.

perience and understanding, that once the pertinent facts are placed in evidence the jury is capable of deciding whether a fire was of incendiay origin just as well as the expert, and that to permit the expert to give his opinion constitutes an invasion of the province and function of the jury and a substitution of the expert's opinion for that of the jury on the ultimate issue to be decided.

There were presented to the jury all of the pertinent facts and materials for the judgment to be exercised by it, i.e., what caused the fire. If this was a matter of such common experience and understanding that the jury could decide the question without receiving assistance by way of an opinion from some other person, then the opinion evidence should have been excluded because it would be superfluous.[18] But if under the particular circumstances related here the jury could receive appreciable help or assistance from the opinion of the expert witness, then his testimony was admissible.[19] It would not be a ground for objection in the latter instance that the opinion embraced the ultimate issue to be decided, i.e., the cause of the fire. The jury decides this issue—not the expert witness—and all that is done is to permit the jury to receive some assistance where it is needed and from a person who, because of his training, exper-

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[18] 7 Wigmore, Evidence § 1918, at 10 (3d ed. 1940).

[19] 7 Wigmore, Evidence § 1923, at 21 (3d ed. 1940).

ience and observations, is able to render that assistance.[20]

Questions as to the admissibility of expert testimony should be left to the wise discretion of the trial judge.[21] In the particular circumstances of this case, he felt that the origin of the fire could not have been properly understood or determined without the aid of an opinion from a person of special knowledge and experience. He also felt that the witness was qualified to express an opinion on the matter in issue. The record not only bears out those determinations, but also shows that the witness had a sufficient acquaintance through personal observations and other means of investigation to enable him to express an opinion. There was no error in admitting the opinion of the expert witness.

We have carefully examined the remaining specifications of error raised on this appeal and find that they are without merit. Oxenberg has had a fair trial.

The judgment below is affirmed.

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[20] This view is in accord with that expressed by the National Conferene of Commissioners on Uniform State Laws in its 1953 draft of "Uniform Rules of Evidence." Rule 56(4) provides that "Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it emrbaces the ultimate issue or issus to be decided by the trier of the fact."

[21] Gilbert v. Gulf Oil Corporation, 175 F. 2d 705, 709 (4th iCr. 1949). See also Standard Oil Company of California v. Moore, 251 F. 2d 188, 221 (9th Cir. 1957).